IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/09/2004

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

O.S.A.No.181 of 2003 and O.S.A.No.110 of 2004
and
C.M.P.Nos.7346 and 7347 of 2003

M.Radheshyamlal .. Appellant

-Vs-

Shailesh .. Respondent

PRAYER in O.S.A.No.181 of 2003: Against the judgment dated 18.11.2002 made in Review Appln.No.5118 of 2001 in Appln.NO.3765 of 2001 in C. S.No.331 of 1996.

PRAYER in O.S.A.No.110 of 2004: Against the judgment dated 10.10.2001 made in Appln.No.3765 of 2001 in C.S.No.331 of 1996.

!For Appellant : Mr.Samir

^For Respondent : Mr.Sampath Kumar,
Senior Counsel

:JUDGMENT
(The judgment of this Court was delivered by P.D.DINAKARAN.J.)

O.S.A.No.181 of 2003 is directed against the judgment dated 18.11.20 02 made in Review Appln.No.5118 of 2001 in Appln.No.3765 of 2001 in C.S.No.331 of 1996, whereas O.S.A.No.110 of 2004 is directed against the judgment dated 10.10.2001 made in Application No.3765 of 2001 in C.S.No.331 of 1996.

2.1. The appellant in these appeals is the plaintiff in C.S.No.331 of 1996 laid for:
(i)declaring that the plaintiff is the owner of the premises, land and building, Old No.14, New No.18, Peria Neikkaran Street, Sowcarpet, Madras-79, by virtue of his having perfected his title by adverse possession; and
(ii) granting a permanent injunction restraining the defendants therein jointly and severally and/or others acting for or through them or anyone of them interfering with and disturbing his peaceful possession and enjoyment of the said property.
2.2. Since the second defendant/respondent herein was set ex parte by

a judgment dated 27.3.2000 in the said suit, the second defendant/respondent herein has filed Application No.3765 of 2001 to set aside the said ex parte decree. The learned Single Judge by an order dated 10.10.2001 allowed the said Application No.3765 of 2001 holding as follows:
"This application is seriously opposed. However, having regard to the fact that it is an ex parte decree and the complaint of the applicant is that he had not received notice, it is just and proper that there should be a decision on merits. Consequently, this application stands allowed. However, the applicant is to pay a sum of Rs.2500/- (Rupees two thousand five hundred only) to the counsel for the respondent within a period of four weeks from today as costs."

2.3. As a result, the plaintiff/appellant filed Application No.5118 of 2001 to review the order dated 10.10.2001 made in Application No.3 765 of 2001 in C.S.No.331 of 1996 invoking Order 47 Rule 1 of the Code of Civil

Procedure (for brevity "the CPC") and the learned Single Judge, by an order dated 18.11.2002 dismissed Application No.5118 of 2 001, relevant portion of which reads as follows:

"The present application is taken out to review that order. Mr.M.V. Venkataseshan, learned counsel for the applicant, has relied on a number of judgments, which, in my view, are not necessary to refer to, having regard to the fact that the decree passed was an ex parte decree and the applicant in Application No.3765 of 2001 should have an opportunity to contest the case on merits, I had allowed the application. None of the ingredients necessary for review is present in the instant case. This application is dismissed."

2.4. Aggrieved by the said orders dated 10.10.2001 and 18.11.2002, plaintiff in C.S.No.331 of 1996 has preferred the above appeals in O. S.A.Nos.110 of 2004 and 181 of 2003 respectively.

3.1. Mr.Sampath Kumar, learned senior counsel for the second defendant/respondent, took a preliminary and firm objection as to the maintainability of these appeals.

3.2. According to Mr.Sampath Kumar, learned senior counsel, O.S.A. No.181 of 2003 against the judgment dated 18.11.2002 made in Review Appln.No.5118 of 2001 in Appln.NO.3765 of 2001 in C.S.No.331 of 1996 is not maintainable in law in view of Order 47 Rule 7 read with Order 4 3 Rule 1(w) and Order 47 Rule 4(2) of the CPC read with Section 104 of the CPC.

3.3. Mr.Sampath Kumar, learned senior counsel for the respondent also contended that O.S.A.No.110 of 2004 against the judgment dated 10.1 0.2001 made in Appln.No.3765 of 2001 in C.S.No.331 of 1996 setting aside the ex parte decree dated 27.3.2000 is not also maintainable in view of Order 43 Rule 1(d) of the CPC. To substantiate the said contention, the learned counsel placed reliance on the decisions of the Apex Court in (i) GANGA BAI v. VIJAY KUMAR, AIR 1974 SC 1126; and (ii) MITHAILAL DALSANGAR SINGH & OTHERS v. ANNABAI DEVRAM KINI & OTHERS, 2004-2-LW 366.

4. Per contra, Mr.Samir, learned counsel for the plaintiff/ appellant, referring to Clause 15 of the Letters Patent, contends that the appeals are maintainable.

5. We have given careful consideration to the submissions of both sides.

6. From the above rival contentions, the following vital issues raise for our consideration:
(i) whether an appeal would lie against an order setting aside the ex parte decree under Order 47 read with Section 104 of the CPC in view of the bar imposed under Order 43 Rule 1(d) of the CPC? and
(ii) Whether an appeal would lie against the dismissal of the review application made under Order 47 Rule 4(2) read with Section 104 of the CPC in view of the specific bar under Order 47 Rule 7 read with Order 43 Rule 1(w) of the CPC? and
(iii)Whether these appeals are maintainable in law under Clause 15 of the Letters Patent?

7.1. Issue (i) - Whether an appeal would lie against an order setting aside the ex parte decree under Order 47 read with Section 104 of the CPC in view of the bar imposed under Order 43 Rule 1(d) of the CPC?

7.2. To appreciate the respective contentions, it is necessary to have before us the operational spectrum from the relevant provisions of Order 9 Rule 13, Order 43 Rule 1(d) and Section 104 of the CPC, which read as under:
Order 9 Rule 13:
Setting aside decree ex parte against defendant.-
In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:
Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
[Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]
[Explanation - Where there has been an appeal against a decree passed ex parte under this Rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this Rule for setting aside that ex parte decree.]"

"Order 43 Rule 1(d):
Appeals from orders: - An appeal shall lie from the following orders under the provisions of Section 104, namely:-
(a) to (c) ....

(d) an order under Rule 13 of Order 9 rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte."

Section 104:

Orders from which appeal lies -

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:
(a) to (f) (Omitted by Arbitration Act, 1940)
(ff) an order under Section 35-A;

(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;
(g) an order under Section 95;
(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section." (emphasis supplied)

7.3. When an application is made under Order 9 Rule 13 of the CPC for setting aside an ex parte decree, if such an application is rejected then alone an appeal would lie under Order 43 Rule 1(d) of the CPC. Section 104 of the CPC which is a charging section for preferring an appeal from orders, makes it clear that an appeal shall lie from the following orders save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other order and Section 104(2) of the CPC prohibits that no appeal shall lie from any order passed in appeal under this section.

7.4. From a careful examination of the statutory framework, viz., Section 104 read with Rule 1(d) of Order 43 CPC, it is clear that while an appeal is provided against an order refusing to set aside an ex parte decree, no appeal is maintainable in view of Section 104(2) of CPC.

7.5. In the instant case, the order dated 10.10.2001 made in Application No.3765 of 2001, which is the subject matter in O.S.A.No.110 of 2004 is not an order rejecting an application filed under Order 9 Rule 13 of the CPC to set aside the ex parte decree, but an order allowing the application. We, therefore, hold that O.S.A.No.110 of 2004 is not

maintainable in law.

7.5. Issue (i) is answered in negative against the appellant.

8.1. Issue (ii): Whether an appeal would lie against the dismissal of the review application made under Order 47 Rule 4(2) read with Section 104 of the CPC in view of the specific bar under Order 47 Rule 7 read with Order 43 Rule 1(w) of the CPC?

8.2. A reference to Order 43 Rule 1(w), Order 47 Rule 4(2), Order 47 Rule 7 of the CPC, at this juncture, is apposite:
"Order 43 Rule 1:
Appeals from orders -
An appeal shall lie from the following orders under the provisions of Section 104, namely:
(a) to (v) ...
(w) an order under Rule 4 of Order XLVII granting an application for review."

"Order 47 Rule 4(2):
Application where granted -
Where the Court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that:
(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and
(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

"Order 47 Rule 7:
Order of rejection not appealable. Objections to order granting application: -
(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.
(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.
(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party."

8.3. A conjoint reading of all these provisions would make it clear that a review is permissible only under Order 47 Rule 1 of the CPC for a

limited purpose, namely for a person considering himself aggrieved:-
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes.

8.4. We have already made it clear that Order 43 Rule 1(d) of the CPC bars an appeal against the setting aside of ex parte decree inasmuch as it permits an appeal only against an orders rejecting an application for an order to set aside a decree passed ex parte. Therefore, the plaintiff/ appellant is only left with review jurisdiction under Order 47 of the CPC which he has rightly exercised by filing Application No.5118 of 2001. However, if such a review application is rejected, the same is not appealable in view of Order 47 Rule 7 of the CPC. On the other hand, if the said application is allowed, that will not be an end in so far as the second defendant/respondent is concerned, in view of the protection provided under Order 43 Rule 1(w) of the CPC. The above scheme of the Code is only intended to avoid any circumvention to the proceedings because the appellant by preferring a review application under Order 47 of the CPC has availed an opportunity to challenge the order dated 10.10.2001 setting aside the ex parte decree.

8.5. Since, in the instant case, the application No.5118 of 2001, to review the order dated 10.10.2001 made in Application No.3765 of 200 1 in O.S.No.331 of 1996, was dismissed, no appeal is maintainable under Order 43 Rule 1(w) read with Section 104 of the CPC, which is applicable in the case where review is granted. Moreover, in view of the specific bar to maintain an

appeal as provided under Section 104 of the CPC, which is already discussed with reference to issue (i), referred to above, O.S.A.No.181 of 2003 is also not maintainable.

8.6. Issue (ii) is answered in negative against the appellant.

9.1. Issue (iii) - Whether these appeals are maintainable in law under Clause 15 of the Letters Patent?

9.2. Mr.Samir, learned counsel for the appellant to sustain these appeals, referred to Clause 15 of the Letters Patent, which reads as follows:
"15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction.-

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of a revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction)

of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made (on or after the first day of February, 1929), in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

9.3. In this regard, it is apt to refer the decision in MITHAILAL DALSANGAR SINGH & OTHERS v. ANNABAI DEVRAM KINI & OTHERS, 2004-2-LW 36 6, whereunder the Apex Court has observed as follows:
"... 12. We are also of the opinion that the Letters Patent appeal against the order setting aside the abatement of the suit was not maintainable. What is a 'judgment' within the meaning of Letters Patent came up for the consideration of this Court in Shah Babulal Khimji v. Behan P.Kangro, AIR 1981 SC 1786=94 LW 91. It was held that a decision by a trial judge on a controversy which affects valuable rights of one of the parties is a 'judgment'. However, an interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties,and which work serious injustice to the party concerned. This court further held that there is no inconsistency between Section 104 read with Order 43 Rule 1 of the CPC and the appeals under the Letters Patent. The Letters Patent do not exclude or override the application of Section 104 read with Order 43 Rule 1 CPC to internal appeals within the High Court. Even if it is assumed that Order 43 Rule 1 does not apply to Letters Patent appeals yet the principles governing those provisions would apply by a process of analogy. A perusal of Section 104 read with Rule 1 of Order 43 of the CPC shows that while an appeal is provided against an order refusing to set aside the abatement or dismissal of a suit; there is no appeal provided against an order whereby the abatement or dismissal of a suit has been set aside. Whether the trial judge passed an order setting aside an abatement or allowed substitution of the legal representatives, no valuable right or parties was decided. The constitution of the suit was rendered good and the suit proceeded ahead for being tried on merits. Such an order does not amount to 'judgment' within the meaning of Letters Patent."
(emphasis supplied)

9.4. It is, therefore, clear that unless and otherwise the interlocutory order decides the valuable right of the parties, no appeal is maintainable under Clause 15 of the Letters Patent. In the instant case, the valuable right of the parties is not decided by the orders on appeal. In the same decision, the Apex Court also observed that the courts have to adopt a justice oriented approach while disposing the applications when the litigant seeks an oppo rtunity to determine his rights. The same view has also been

expressed by the Apex Court in the decision of GANGA BAI v. VIJAY KUMAR, AIR 1974 SC 1126, whereunder the rights of the Courts under Section 104(1) and Order 43 Rule 1 of the CPC have been dealt with, relevant portion of the said decision is extracted hereunder:
".. 17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43 Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal."

9.5. The Apex Court in SHAH BABULAL KHIMJI v. JAYABEN, AIR 1981 SC 1 786, dealt with the scope and object of Clause 15 of the Letters Patent and the test to be determined when the same has to be exercised. The Apex Court in clear terms has held that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned, and that the right conferred under Clause 15 of the Letters Patent cannot be exercised as a mere discretion or routine exercise of power.

9.6. We are, therefore, of the considered opinion that these appeals are not maintainable even under Clause 15 of the Letters Patent.

9.7. Issue (iii) is answered accordingly.

9. For all these reasons, we are inclined to hold that these appeals are not maintainable in law and accordingly, they are dismissed. No costs. Consequently, connected C.M.Ps. are closed.

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Internet:Yes

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